

ORIGINAL

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VINCENT MASINO, KEITH LOSCALZO, RAY
MARIA, ANTHONY FASULO, DAVID DELUCIA
and DOMINICK AGOSTINO, as Trustees and
Fiduciaries of the PAVERS AND ROAD
BUILDERS DISTRICT COUNCIL WELFARE,
PENSION, ANNUITY AND APPRENTICESHIP,
SKILL IMPROVEMENT AND TRAINING
FUNDS,

MEMORANDUM AND ORDER

Case No. 08-CV-898 (FB) (RML)

Plaintiffs,

-against-

TUCCI EQUIPMENT RENTAL CORPORATION,

Defendant.
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Appearance:

For the Plaintiffs:

CHARLES R. VIRGINIA, ESQ.
Barnes, Iaccarino, Virginia, Ambinder &
Shepherd, PLLC
111 Broadway
14th Floor, Suite 1403
New York, NY 10006

BLOCK, Senior District Judge:

Plaintiffs brought this action pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132, 1145, to enforce a collective bargaining agreement under which the defendant failed to make adequate contributions to pension funds. Acting on a referral from the Court, Magistrate Judge Robert M. Levy issued a Report and Recommendation on October 8, 2008 ("October 8 R&R") recommending that an award of

\$39,170.13 plus interest be entered in favor of plaintiff and against defendants. The October 8 R&R recited that “[a]ny objections to this Report and Recommendation must be filed . . . within ten (10) business days. Failure to file objections within the specified time waives the right to appeal the district court’s order.” October 8 R&R at 7. On October 28, 2008, plaintiffs submitted an affidavit of service to the effect that the October 8 R&R was mailed to the defendant. A second R&R was issued on November 20, 2008 (“November 20 R&R”), addressing an issue on which the October 8 R&R had given plaintiffs leave to submit further documentation. The November 20 R&R recommended the same total award as the previous recommendation. On November 26, 2008, plaintiffs submitted an affidavit of service to the effect that the November 20 R&R was mailed to the defendant. To date, no objections to either R&R have been filed.

If clear notice has been given of the consequences of failure to object, and there are no objections, the Court may adopt the R&R without *de novo* review. *See Thomas v. Arn*, 474 U.S. 140, 149-50 (1985); *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (“Where parties receive clear notice of the consequences, failure timely to object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.”). The Court will excuse the failure to object, however, and conduct *de novo* review if it appears that the magistrate judge may have committed plain error. *See Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 174 (2d Cir. 2000).

Since there is nothing in either R&R by Magistrate Judge Levy that suggests plain error—or any other form of error—the Court adopts them both without *de novo*

review.

The October 8 R&R recommends that plaintiffs be awarded:

(a) \$30,867.90 in unpaid principal contributions; (b) interest in the amount of \$8.46 per day for each day from March 15, 2007 until the date of entry of judgment; (c) \$3,086.79 in liquidated damages; (d) \$4,765.50 in legal fees; and (e) \$449.94 in costs. In total, I recommend an award to plaintiffs of \$39,170.13 plus interest.

October 8 R&R at 9. The November 20 R&R denied plaintiffs' request for audit fees, and therefore did not change the amount of the total award recommended in the October 8 R&R. At the rate of \$8.46 per day between March 15, 2007 and today, December 19, 2008, interest on the unpaid principal contributions amounts to \$5,456.70. The total award in favor of plaintiffs, then, is \$44,626.83.

SO ORDERED.

s/FB

~~CE~~FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
December 19, 2008